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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

STEPHEN S. SLAUSON, Plaintiff and Respondent, v. ALAMEDA POWER & TELECOM, Defendant and Appellant.	A122496 (Alameda County Super. Ct. No. RG06278564)

I. INTRODUCTION

Defendant and appellant Alameda Power & Telecom (AP&T) appeals from the trial court's order denying its request for attorney's fees under Code of Civil Procedure, section 1038[1] after the trial court granted, with leave to amend, its motion for summary judgment against plaintiff and respondent Stephen Slauson. AP&T contends that, because Slauson filed his action against it without reasonable cause and in bad faith, the trial court erred in denying its motion for fees. We disagree and affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

In 2005, Slauson and AP&T entered into a contract under which Slauson agreed to perform underground utility upgrades in the City of Alameda. On February 13, 2006, AP&T terminated the contract.

[1] All further statutory references are to the Code of Civil Procedure, unless otherwise noted.

AP&T paid Slauson $435,832.87 for the work he performed before the contract was terminated. On May 5, 2006, Slauson submitted a "Termination Claim" to AP&T's Support Services Supervisor, Tom Montoya. In this letter, Slauson sought an additional $249,100.

On July 11, 2006, 67 days after submitting his claim for additional payment, Slauson filed, in pro per, a complaint for breach of contract against AP&T.

On October 5, 2007, AP&T moved for summary judgment against Slauson. It argued that Slauson had failed to comply with Government Code section 910, which requires that, before filing a lawsuit against a government entity, a claim complying with this statute must be submitted to the appropriate representatives of the government. According to AP&T, Slauson's claim was not in the proper format, not timely, and never received by the appropriate city entities. AP&T contended that the entire action failed as a matter of law.

Slauson, in response, argued that his letter complied with the Government Code and, in any event, that the letter constituted a timely claim as required under his contract with AP&T.

On February 27, 2008, the trial court granted AP&T's summary judgment motion. The court explained that although Slauson had complied with the procedure set out in its contract with AP&T for submitting a claim, his claim did not comply with the Government Code. Rather, his claim was "only . . . the first step of the termination claim procedure . . . ." Further, Slauson mistakenly "filed suit within the 15-day period after failing to receive a response to the termination claim within 60 days, rather than demanding an informal conference to meet and confer and attempt to resolve the dispute informally, followed by, if those efforts proved to be unsuccessful, the submission of a Government Code claim to an appropriate entity."

The court dismissed Slauson's complaint without prejudice. In so doing, it specifically noted that "[t]his order does not constitute an adjudication on the merits of Plaintiff's claim, and Plaintiff is not precluded by this order from bringing such claims at

a later date. Although the issue of whether Plaintiff's claims could timely be presented under the Government Code is not squarely before the Court on this motion, the terms of the Agreement and applicable authority discussed by the parties in their papers indicates that Plaintiff has not waived the right to comply with the claims presentation requirements under the circumstances. (See Pub. Contract Code, § 20104.2(e) ['the running of the period of time within which a claim must be filed shall be tolled from the time the claimant submits his or her written claim pursuant to subdivision (a) until the time that claim is denied as a result of the meet and confer process . . . .'].)"

AP&T then sought $85,402 in attorney's fees under section 1038. It argued that Slauson brought his claim without reasonable cause and in bad faith. The trial court denied this request. It ruled that AP&T "has not demonstrated that [Slauson] filed or maintained this action with subjective bad faith . . . ." It also determined that the suit did not lack "reasonable cause" because the suit was not one that "'no reasonable attorney would have thought . . . tenable.' [¶] First . . . there has been no determination (or evidence presented) that Plaintiff does not have a legitimate claim for additional compensation under the parties' contract, had he complied with the government presentation requirements. While AP&T is correct that claims presentation is an element of a cause of action against a public entity. . . , most (if not all) of the authority cited by the parties in which claims were found to have been brought in bad faith or without reasonable cause involve claims of liability that are groundless on the merits, rather than for procedural reasons."

The court went on to say that, "Second even as to the procedural issue, the Court finds that Plaintiff had a colorable basis (that a reasonable attorney could find tenable) for contending that the 5/5/06 letter complied with the claims presentation requirements. In fact, the Court continued the original hearing on the motion for summary judgment in part because it was interested in further briefing on the question of whether Plaintiff's compliance with the contractual procedures for presenting a claim for termination payments could satisfy the government claims presentation requirements. Among other

things, Plaintiff made a facially tenable argument that the Government Code allows a public entity to 'include in any written agreement . . . provisions governing the presentation, by or on behalf of any party thereto, of any and all claims arising out of or related to the agreement and the consideration and payment of such claims' . . . and that a 'claims procedure established by agreement made pursuant to . . . Section 930.2 exclusively governs the claims too which it relates. . . .' [Citation.] AP&T had not addressed this matter in its summary judgment papers, and it took the Court a careful analysis of the terms of the contract (which were not submitted with AP&T's motion but were submitted with the opposition) to determine that such contractual claims procedure did not excuse compliance with the Government Code claims presentation requirements under the circumstances."

This timely appeal followed.

III. DISCUSSION

A. *Appealable Order*

Slauson contends that the appeal must be dismissed because the trial court's order denying AP&T's fee motion is not appealable. We asked for additional briefing on this issue from AP&T, and now conclude that the order is appealable.

An order denying attorney's fees is appealable when it is made after a final judgment. (§904.1, subd. (a)(2).) The court's dismissal of Slauson's claim without prejudice is a final, appealable order. Although the court indicated that Slauson could certainly file a new claim, if and when he properly completed the procedure for submitting his claim to AP&T, this fact alone does not render the court's order interlocutory and non-appealable. In *Topa Ins. Co. v. Fireman's Fund Ins. Companies* (1995) 39 Cal.App.4th 1331, 1336 (*Topa*), the trial court dismissed an action without prejudice in order to permit the plaintiff to file a new claim against the defendant, if such a claim was warranted. The court of appeal concluded that this dismissal was a final, appealable order. Here, too, the trial court's order dismissing the action was final, even though the court also indicated that Slauson could file a new action, after he had

complied with the procedure for filing it. Slauson has, in fact, done so, having filed a new complaint. Such an order "represents a final judicial determination of [the parties'] rights . . . in *this* action and is therefore appealable . . . ." (*Id.* at p. 1336.)

Slauson cites a number of inapposite cases in support of the contrary argument. (See *Hoveida v. Scripps Health* (2005) 125 Cal.App.4th 1466; *Tudor Ranches, Inc. v. State Compensation Insurance Fund* (1998) 65 Cal.App.4th 1422; *Hill v. City of Clovis* (1998) 63 Cal.App.4th 434; *Four Point Entertainment, Inc. v. New World Entertainment, Ltd.* (1997) 60 Cal.App.4th 79; *Jackson v. Wells Fargo Bank* (1997) 54 Cal.App.4th 240, *In re Lauren P.* (1996) 44 Cal.App.4th 763.) These cases concern situations in which the parties stipulated to a dismissal without prejudice in order to obtain review of an otherwise unreviewable interlocutory order. In so doing, the parties agreed that, following review, the case could be refiled. Appellate courts, including this one, have condemned such efforts to circumvent the one final judgment rule and have refused to review these sham dismissals.

For example, in *Jackson v. Wells Fargo Bank*, *supra*, 54 Cal.App.4th at page 244, this court dismissed an appeal from a stipulated dismissal. In so doing, we held that "[w]e can scarcely conceive of anything more clearly inconsistent with finality than such a stipulation." (*Ibid.*) We refused to give the plaintiff the "right—even with a willing accomplice in the respondent—to separate those causes of action into two compartments for separate appellate treatment at different points in time." (*Id.* at p. 245.)

This case is not comparable to *Jackson* or the many cases similar to it. Here, the parties did not seek a dismissal in order to secure appellate review of an otherwise unreviewable order. Rather, the court properly dismissed Slauson's claim because he had not yet completed a requisite step to filing it. As in *Topa*, the court's order of dismissal without prejudice is a final, reviewable order and, therefore, the court's decision regarding AP&T's fee request is also reviewable. (§ 904.1, subd. (a)(2).)

B. ***Attorney Fees Award***

AP&T challenges the trial court's denial of its request for attorney fees under Code of Civil Procedure section 1038. "[S]ection 1038 permits trial courts to award defendants their costs and fees on a finding that plaintiffs did not bring or maintain the action either with reasonable cause or in the good faith belief in a 'justifiable controversy under the facts and law.' (§ 1038, subd. (a).)" (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 864 (*Kobzoff*).) Therefore, a fee award may be made on the ground that a plaintiff did not bring its action in good faith *or* on the ground that it did not have reasonable cause.

As our colleagues in Division One recently explained, the standards of review for these two grounds are not the same. "The applicable standard of review under section 1038 was set forth in *Knight v. City of Capitola* (1992) 4 Cal.App.4th 918 [] (*Knight): 'Good faith*, or its absence, involves a factual inquiry into the plaintiff's subjective state of mind [citations] . . . A subjective state of mind will rarely be susceptible of direct proof; usually the trial court will be required to infer it from circumstantial evidence. Because the good faith issue is factual, the question on appeal will be whether the evidence of record was sufficient to sustain the trial court's finding." (*Clark v. Optical Coating Laboratory, Inc.* (2008) 165 Cal.App.4th 150, 183 (*Clark*).)

The standard of review with regard to the question of "reasonable cause" is different: "'*Reasonable* cause is to be determined objectively, as a matter of law, on the basis of the facts known to the plaintiff when he or she filed or maintained the action. Once what the plaintiff (or his or her attorney) knew has been determined, or found to be undisputed, it is for the court to decide " 'whether any reasonable attorney would have thought the claim tenable . . . .'" [Citations.] Because the opinion of the hypothetical reasonable attorney is to be determined as a matter of law, reasonable cause is subject to de novo review on appeal.'" (*Clark, supra,* 165 Cal.App.4th at p. 183.) We now consider each of these grounds.

1. *Subjective Bad Faith*

The trial court found that Slauson did not maintain his suit with "subjective bad faith." As we have explained, we review this finding under the substantial evidence standard of review and conclude that the trial court did not err.

AP&T contends there is evidence in the record that Slauson did, in fact, proceed in bad faith: that he had reviewed his contract with AP&T, was aware of the requirements of the Government Code, and was aware that it was AP&T's position that he had failed to comply with the Government Code and, therefore, could not yet bring his complaint against it. AP&T argues that these facts establish that Slauson did not have a good faith belief that his complaint was tenable.

In making this argument, however, AP&T misstates the substantial evidence standard of review. The presence in the record of countervailing evidence does not negate the existence of substantial evidence to support the court's finding. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.) Here, the court had before it substantial evidence from which it could infer that Slauson acted in a good faith belief that there was a "'justifiable controversy under the facts and law.'" (*Kobzoff, supra,* 19 Cal.4th at p. 864.) In a declaration submitted with his opposition to AP&T's motion for attorney's fees, Slauson stated that he believed the contract he had entered into with AP&T required him to proceed as he had done, and that this was the "exclusive means" available to him for "obtaining compensation for the termination claim, short of a lawsuit [which he] filed . . . when Alameda Power and Telcom [sic] ignored my claim." The trial court could infer from this statement that Slauson, who filed his claim in pro per, proceeded as he understood he was required to proceed, and filed his lawsuit only after he failed to receive any response from AP&T. The trial court's finding of good faith is, therefore, supported by substantial evidence.

2. *Reasonable Cause*

AP&T contends that, because it stated, in its answer to Slauson's complaint, in interrogatory responses, and in its deposition of Slauson, that it believed Slauson had

failed to comply with the Government Code, a position on which it ultimately prevailed at the summary judgment stage, Slauson's filing of a complaint against it was unreasonable as a matter of law. We reject AP&T's argument, which is essentially that a defendant who fails to win on summary judgment must be assumed to have proceeded unreasonably. This is incorrect. "A defendant may not recover section 1038 costs simply because it won a summary judgment or other dispositive motion; victory does not per se indicate lack of reasonable cause. [Citation.] That victory is simply the first step." (*Kobzoff, supra,* 19 Cal.4th at p. 856.) AP&T was required to show not merely that it won at the summary judgment stage, but that Slauson's claim was one that no """reasonable attorney would have thought . . . tenable . . . ."""" (*Knight ,supra,* 4 Cal.App.4th at p. 932.)

Here, the trial court stated that its decision granting summary judgment was not a simple one. As the trial court explained, Slauson's argument that his compliance with the contractual claims requirements exempted him from fulfilling the requirements of the Government Code had a "colorable basis," a conclusion with which we agree. Determining whether Slauson was subject to the Government Code required a close analysis of several Government Code sections, as well as the contract itself and the result of that analysis was far from obvious.

Government Code section 930.2 permits a public entity to "include in any written agreement to which the entity, its governing body, or any board or employee thereof in an official capacity is a party, provisions governing the presentation, by or on behalf of any party thereto, of any or all claims arising out of or related to the agreement and the consideration and payment of such claims." Section 930.4 provides that "[a] claims procedure established by agreement made pursuant to Section 930 or Section 930.2 exclusively governs the claims to which it relates." Slauson's argument—that the claims procedure set out in the contract superseded Government Code section 910—while ultimately unsuccessful, was not, as a matter of law, one that a reasonable attorney would have thought untenable. The contract Slauson entered into with AP&T does indeed

provide that Slauson's "'performance of [his] duties and obligations specified in [the contract] and submission then mediation of a claim . . . is [Slauson's] sole and exclusive remedy for disputes of all types pertaining to the payment of money. . . .'" However, the contract also provides that compliance with the claim procedures set out in the contract "is a condition precedent to the right to commence litigation, file a Government Code Claim, or commence any other legal action." The trial court interpreted this language to mean that compliance with the contract's claim's submissions procedures "is merely the beginning of the process for resolution of such a claim, and it is expressly contemplated that a Government Code claim is to be filed if the claim is not thereafter informally resolved." Slauson's contrary claim, however, was not untenable, particularly in light of the close reading of the contract and the statutes required to resolve this issue.

Similarly, in *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1274, a court found that, where the granting of a summary judgment motion was not a "foregone conclusion," "notwithstanding the eventual grant of summary judgment and our affirmance, . . . an attorney for the plaintiff could reasonably have thought the claim tenable."

Here the plaintiff's claim was objectively reasonable, and the City's motion for fees under Code of Civil Procedure section 1038 was properly denied.

IV. DISPOSITION

The order is affirmed. Costs on appeal are awarded to respondent.

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Haerle, J.

We concur:

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Kline, P.J.

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Richman, J.